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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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| -----X | : | |
| EAST END ERUV ASSOCIATION, | : | 13-CV-4810 (AKT) |
| Plaintiff, | : | |
| v. | : | 100 Federal Plaza |
| | : | Central Islip, New York |
| TOWN OF SOUTHAMPTON, | : | January 7, 2014 |
| Defendants. | : | |
| -----X | : | |
| EAST END ERUV ASSOCIATION, | : | 11-CV-213 (AKT) |
| Plaintiff, | : | |
| v. | : | FILED |
| | : | CLERK |
| THE VILLAGE OF WESTHAMPTON BEACH, | : | 2/19/2014 |
| et al., | : | |
| Defendants. | : | U.S. DISTRICT COURT |
| -----X | : | EASTERN DISTRICT OF NEW YORK |
| VERIZON NEW YORK INC., et al., | : | LONG ISLAND OFFICE |
| Plaintiffs, | : | 11-CV-252 (AKT) |
| v. | : | |
| THE VILLAGE OF WESTHAMPTON BEACH, | : | |
| et al., | : | |
| Defendants. | : | |
| -----X | : | |

TRANSCRIPT OF CIVIL CAUSE FOR TELEPHONIC
STATUS CONFERENCE
BEFORE THE HONORABLE A. KATHERINE TOMLINSON
UNITED STATES MAGISTRATE JUDGE

(Appearances on next page.)

Proceedings recorded by electronic sound recording, transcript
produced by transcription service

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3 APPEARANCES:

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1 (Proceedings began at 11:44 a.m.)

2 THE CLERK: Calling Civil Cases 13-4810, East End
3 Eruv Association, Inc. v. Town of Southampton and Civil Case
4 11-213, East End Eruv Association v. Village of Westhampton
5 Beach and Civil Case 11-252, Verizon v. Village of Westhampton
6 Beach, et al.

7 Please state your appearance for the record.

8 MR. SUGARMAN: Weil, Gotshal & Manges for the East
9 End Eruv Association and the individual plaintiffs, Robert
10 Sugarman, Yehudah Buchweitz and Jessie Mishkin, Your Honor.
11 Good morning.

12 THE COURT: Good morning.

13 MS. WEISGERBER: Erica Weisgerber, Debevoise &
14 Plimpton for Verizon New York. Good morning.

15 THE COURT: Good morning.

16 MR. MURDOCK: Good morning, Your Honor. Zachary
17 Murdock from Lazer, Aptheker, Rosella & Yedid for Long Island
18 Power Authority.

19 MR. GUIDO: Good morning, Your Honor. For defendant
20 Town of Southampton and Southampton Zoning Board of Appeals
21 Jaspan Schlesinger by Robert Guido and Seth Presser.

22 THE COURT: Good morning.

23 MALE VOICE: Good morning, Judge. For the Village
24 of Westhampton defendant by [inaudible] McKenna.

25 MR. SHTEIERMAN: Good morning, Your Honor. Joshua

1 Shteierman from Devitt Spellman Barrett for the Village of
2 Quogue.

3 THE COURT: That's I think everyone; is that correct?
4 Anybody that we missed? All right.

5 MR. SUGARMAN: I don't think so, Your Honor.

6 THE COURT: Counsel from Sokoloff Stern just so you
7 know we're having a little trouble -- you're a little garbled.
8 I'm not sure if you're on a cell phone or on a land line but
9 hopefully that won't be an issue.

10 We have some ground to cover today and I'd like to
11 get over a number of things including some questions I have
12 and some determinations I'm going to make here in following up
13 on the status reports that were filed as well as some other
14 issues that are still pending. So let me get started. At the
15 end of this I'll give everybody an opportunity to speak up if
16 there's anything else they want to address today.

17 First of all, going to the issue of the search
18 protocol and deadlines that were set out in our meeting, last
19 meeting in November on November 8th, one of the curiosities I
20 had and I'm going to ask counsel for Southampton to respond to
21 this if you would. It appears that out of the production of
22 the first 10,000, and we're not up yet to the deadline for the
23 second 10,000, but as to the first 10,000 set of materials
24 that were produced only 560 I take it actually went in the
25 production to the plaintiffs which looks to be about a five

1 percent culling here. I'm just curious, and I was hoping that
2 you could shed some light on why that number is at that low
3 figure.

4 MR. GUIDO: I think that number is at a low figure
5 because the search terms are just a little bit too broad and
6 the custodians may be a little bit too broad.

7 By the way, Your Honor, these are the two search
8 terms. That 10,000 documents represents a review of two
9 search terms, the first being Eruv and the second being Leches
10 [Ph.]. It includes a review of the documents that came up
11 with hits from those search terms and what are commonly known
12 as those documents, family members and there are duplicates.
13 So I won't say that every document reviewed came from only
14 those two search terms but that was the universe we were
15 focusing on and I would have expected those documents to have
16 the highest degree of return. Those search terms to have the
17 highest degree of return because they seemed so right on point
18 but they pulled up a wide variety of irrelevant documents.

19 THE COURT: All right. Well, we still have the next
20 two deliveries to be made. You indicated in your letter,
21 Counsel, responding to plaintiff's letter that the -- at the
22 January 31st deadline the Town will have completed the review
23 of nearly 32,000 pieces of ESI and made disclosure of non
24 privileged responsive documents. It says at that time the
25 Town's vendor will be able to advise in reasonable detail as

1 to which search terms will be effective and which terms were
2 ineffective. The vendor will also be able to identify which
3 custodians produced meaningful results and which custodians
4 were not worth reviewing. This information is vital before
5 any conversation can be had on narrowing search terms or
6 custodians or any other set of discovery such as for other
7 temporal periods.

8 So here's what I'm going to direct the manner in
9 which we proceed here. By February the 5th I want a report in
10 writing from the vendor in conjunction with counsel for the
11 Town laying out exactly what you indicated here, which terms,
12 which search terms were effective, which were ineffective and
13 which custodians produced meaningful results and which were
14 not worth reviewing.

15 Once that has been produced, and obviously you'll
16 file that on ECF so that everybody else in the case can take a
17 look at it as well, once that occurs then I'm directing
18 counsel to have a further meet and confer between February 5th
19 and February 13th. I want that meet and confer to consist of
20 further discussions between you and among you as to the
21 narrowing of the search terms and the custodians. I want that
22 issue resolved.

23 If it's not resolved by February 13th then the Town
24 of Southampton is free to move for a protective order but
25 that's to be done by February 17th. And the same thing, I want

1 that done by letter motion so that we can try to expedite a
2 resolution.

3 And following along the normal procedure for letter
4 motions, once that gets filed opposing counsel has three
5 business days to file any opposition.

6 Now, moving onto the issue of the 70 gigabytes that
7 the Town has been using the vendor to facilitate as well,
8 first of all I'm trying to understand -- it's now January 7th.
9 When we discussed what was going to happen with this portion
10 of the discovery on November 8th, which is just about nine
11 weeks ago now, there was supposed to have been a protocol put
12 in place and presumably the production started. I don't have
13 any indication here that any of that was done and so I'd like
14 a response again from counsel for the Town as to where things
15 are with that 70 gigabyte review of non email.

16 MR. GUIDO: The 70 gigabytes of non email ESI has
17 been culled by the vendor to remove program files, Windows
18 files, things that are not documents you would expect to have
19 information in them other than to allow you to run a program
20 on your computer. It has also removed duplicates from the
21 production and that has reduced the amount of data there from
22 70 gigabytes to approximately 60 gigabytes. So a lot of data
23 was culled out of it.

24 The next step in that process will be to apply the
25 agreed upon search terms to that 60 gigabytes and see what

1 documents come back based on those search terms but for the
2 same reason we want to narrow the search terms for other
3 temporal periods we'd like to narrow them for this 60 gig so
4 we get something better than a five percent return.

5 THE COURT: Let me ask this question. You have --
6 obviously you're paying a professional vendor to go through
7 this exercise. Why in nine weeks are we only at the stage
8 where they've culled out a reduction of ten gigabytes and you
9 haven't proceeded from there? That's what I'm trying to get
10 at.

11 MR. GUIDO: It's not that -- okay. They're doing the
12 culling, the electronic culling, but we're doing the documents
13 themselves. We're the ones who are actually looking at each
14 piece of paper, reading the words on it and making reviews
15 thereof. We explained this to plaintiffs earlier that right
16 now we're doing the 32,000. If we could work faster than
17 we're currently working we would complete the 32,000 even
18 faster than we are now. Unfortunately we -- just as we came
19 through the 32,000 any faster we can't do more than that at
20 the same time and to do anything before the 32,000 is done
21 we'd need to be applying the same search terms, the same
22 formulas that are resulting in a poor a return rate, and that
23 just doesn't seem efficient to anyone. It just places an
24 enormous burden on the Town of reviewing vast quantities of
25 data that have been demonstrated in earlier productions to not

1 be particularly responsive.

2 THE COURT: So are the plaintiffs in agreement that
3 at the end of this production of the 32,000 that we've been
4 talking about that as I mentioned earlier I've already
5 directed you with regard to those documents to have a further
6 meet and confer to narrow the search terms and the custodians?
7 Are you prepared to apply the same rationale to this 70
8 gigabyte or now 60 gigabyte production?

9 MR. BUCHWEITZ: Your Honor, Yehudah Buchweitz for the
10 plaintiffs, Eruv Association, Individually. When we were here
11 we agreed to extend the date for the review of the documents
12 from December 31 to the end of January. It was based on an
13 understanding that after the review of the first bunch, the
14 10,000 we would each be in a better position to discuss search
15 terms and custodians and we had asked Southampton to come back
16 with a proposal on custodians. We had asked them for a number
17 of other things as well.

18 I think on the 70 gig, Your Honor, I think that the
19 prior terms were negotiated extensively. While they
20 apparently came back with a low hit ratio it's not clear to me
21 that it's not because it's duplicates which wouldn't mean that
22 it's actually the relevant documents but just [inaudible]
23 documents. So I think that their vendor which could work in
24 parallel with counsel should at least run the prior search
25 terms on the remaining data and see what comes back and

1 provide us with a report on the number of documents. If the
2 number of documents are massive -- and be duplicated against
3 the documents that were attached to the email. If the
4 documents are massive then okay, then we can wait and we can
5 work on a reduced search term list. But we don't see any
6 reason why that can't work in parallel.

7 MR. GUIDO: Your Honor --

8 THE COURT: Hold on. Hold on one second. Just so I
9 understand this. You're telling me that you want them to do
10 this preliminary culling of the 60 gigabytes that are left
11 there just on those two search terms, Eruv and Leches?

12 MR. BUCHWEITZ: No, Your Honor. We agreed -- the
13 parties agreed in the context -- all parties agreed to a total
14 of 30 search terms each that they were going to propose and
15 then we negotiated them very specifically back and forth.
16 Southampton turned out to be 20 something search terms that we
17 agreed on. This was back before Southampton was dismissed the
18 first time in early 2013. Those were the terms that were
19 agreed on and those were the terms that resulted in the 32,000
20 documents.

21 I think that what I'm proposing, Your Honor, is that
22 those terms, the 20 something terms that we had agreed on
23 previously be run against this data, be de-duplicated against
24 the attachments to the emails because I suspect that the non
25 emailed documents will have many duplicates, the ones attached

1 to emails and then see what comes back. And all of that can
2 be done without counsel for Southampton spending a minute.
3 That's all stuff that can be done by a vendor. That's all,
4 you know, basically vendor function, and then we can get a
5 report from them on that and we can see whether or not those
6 should be reviewed now or can be reviewed or need to be
7 further culled.

8 THE COURT: Let me hear from counsel for the Town.

9 MR. GUIDO: Your Honor, we agree with that proposal.
10 We are happy to have our vendor report those functions and we
11 would get a report back based on those functions. I'm not
12 saying we would agree to do whatever plaintiffs wanted at that
13 point but we would certainly be willing to meet and confer. I
14 agree with Mr. Buchweitz that that would be good information
15 to have and would help us meet and confer and I'm happy to
16 have our vendor go down that path.

17 THE COURT: Do you have any sense at all from your
18 vendor in terms of how much time it took to do this original
19 culling to get you from the 70 gigabytes to the 60 gigabytes,
20 how long it might possibly take for example to run these 20
21 search terms or 20 plus search terms against that 60 gigabyte
22 production?

23 MR. GUIDO: I believe I could have that data, and I
24 haven't of course asked the vendor yet, but I believe I could
25 have that data by the middle of next week. With that said, I

1 don't want to get in the vendor's way of our next production
2 to the plaintiffs which is scheduled to go out on the 15th.
3 But I believe we could have it by the beginning to the middle
4 of next week unless it gets in their way which I can't imagine
5 it would.

6 THE COURT: Okay. That at least sounds reasonable to
7 me. Frankly I don't see any reason why whatever results you
8 get shouldn't be at least shown right away to plaintiff's
9 counsel and then when you are sitting down to have your final
10 resolution as I've already directed you to do between the --
11 by the 13th of February why this can't be added to the mix to
12 try to get a resolution. To me that seems reasonable. Does
13 anybody have a problem with that?

14 MR. GUIDO: If the vendor can get me the information
15 that quickly, Your Honor, I believe we can finish it up by the
16 13th. I will follow up with plaintiffs as soon as the vendor
17 gives me when they can get it by. My fear is if they say we
18 can't get it to them until Friday the 10th, you know, we may
19 not have time to confer before the 13th.

20 THE COURT: Well, let me do this. I want you to
21 confer with your vendor and then send me a one paragraph or a
22 couple of sentences in a letter on ECF telling me what the
23 vendors responded to you with their best estimate. All right?

24 MR. GUIDO: Will do.

25 THE COURT: Once I see that and plaintiffs have seen

1 it we'll take up the issue at that point if there's going to
2 be a delay beyond what anybody is anticipating at this point.

3 All right. Moving on, with regard to the issue of
4 discovery that the plaintiffs are seeking from the Town of
5 Southampton's Zoning Board of Appeals, I'm reserving a
6 determination on that issue and you will get a written
7 decision but that's under advisement for the moment.

8 There is a motion to compel outstanding with regard
9 to an assertion of privilege by the plaintiffs on grounds of
10 congregant cleric privilege and common interest doctrine
11 privilege. Looking at this issue the defendants I know have
12 argued here that CPLR 4505 regarding cleric congregant
13 privilege does not apply in federal cases. In cases that
14 arise under federal law privileges against disclosure are
15 governed by principles of federal law. Here, federal common
16 law does recognize that cleric congregant privilege, and I
17 will refer you briefly to United States v. Mohanlal, M-O-H-A-
18 N-L-A-L, 867 F.Supp. 199. That's a Southern District 1994
19 case which also relies In re: Grand Jury Investigation, 918
20 F.2d 374 (3d Cir. 1990).

21 If you also look at Tremmel v. The United States,
22 445 U.S. 40, a 1980 case from the Supreme Court and Cox v.
23 Miller, 296 F.3d 89. That's a Second Circuit case from 2002
24 which says that congregants, cleric privilege applies for
25 communications made in confidence and for the purpose of

1 obtaining spiritual guidance.

2 So based on the review that we've done here, I
3 believe that the appropriate application here is to apply the
4 federal common law since this case arises under federal law.
5 However, that doesn't necessarily mean that all of the
6 documents claimed to be privileged necessary fall under that
7 privilege. So -- and that's also up for review with regard to
8 the common interest privilege.

9 Before I can make a final determination on that
10 motion I'm directing the plaintiffs to produce the documents
11 that are at issue here for an in camera review immediately. I
12 would like the documents as well as the privilege log which I
13 do not have and has obviously not been filed on ECF but I do
14 need that to work from as well.

15 I would like to know if the privilege log has been
16 prepared by the plaintiffs actually lists the specific
17 privileges being asserted for each of those documents
18 individually.

19 MR. BUCHWEITZ: Your Honor, it does.

20 THE COURT: So that should resolve the issue for me
21 then once I have a chance to look at that with the documents
22 and we will try our best to expedite that process as soon as
23 we get the material.

24 With regard to plaintiff's desire to have
25 depositions go forward in these cases, I know that Judge

1 Wexler previously stayed depositions pending the outcome of
2 the court's rulings in the Verizon LIPA action, specifically
3 here this issue of whether or not Verizon LIPA has authority
4 to attach the Leches. I had previously stayed depositions in
5 CV-13-4810 pending the outcome of the motion to dismiss.

6 I understand the fervor on behalf of the plaintiffs.
7 What I will permit at this point is if it's your position,
8 which I assume it is from what you've put in the status
9 reports that you believe certain depositions can be taken now
10 I will allow you to make a submission on notice obviously on
11 ECF to tell me what specific deposition or depositions you
12 believe can be taken now that would not be impacted by the
13 motion to dismiss or the privilege rulings including the fact
14 as well that paper discovery is still going on.

15 I'm happy to get your lists. You're going to have
16 to give me the arguments as to why those specific depositions
17 should be permitted to proceed in light of these other
18 circumstances. The filing, if you wish to make one, is
19 limited to three pages as always and the defendants if in fact
20 that the material gets filed I'll give the defendants a week
21 after it's posted to file any opposition and I'll take a look
22 at it at that point.

23 I decline at this point to set a date for the
24 completion of discovery and for the trial. That's just not
25 realistic in light of what's going on at the moment with

1 regard to discovery.

2 There is a pending motion to intervene in 13-4810.
3 I am denying that motion. The written decision will issue
4 shortly explaining why.

5 I want to address for a moment the document
6 production in the Verizon LIPA case. I know that Verizon and
7 LIPA have not received any documents from the Town of
8 Southampton because Judge Wexler previously stayed discovery
9 against the Town in that action. I had previously directed
10 the parties to meet and confer regarding document production
11 in that case. I'd like someone to tell me what happened as a
12 result of that meet and confer.

13 MR. PRESSER: Your Honor, this is Seth Presser from
14 the Town of Southampton. We did meet and confer and we are
15 following the same schedule as the 13-CV-4810 case. In fact,
16 all counsel were very reasonable in that we conferred not only
17 with counsel for Verizon and LIPA but also with counsel for
18 EEEA to come up with a plan of which search terms would be
19 reviewed first and that is how we ended up reviewing the two
20 search terms we started with.

21 So we filed a letter requesting approval from the
22 court of the same schedule that we had in 4810 and Your Honor
23 approved that schedule.

24 THE COURT: All right. So that at least has been
25 addressed.

1 For my purposes that's what I intended to get
2 through today. I will obviously at this point allow counsel
3 to tell me if there's anything else that they believe needs to
4 be addressed in each of these cases at the moment. So let me
5 start with East End Eruv v. The Town of Southampton. That's
6 the 13-4810 case. Anything from the plaintiffs?

7 MR. BUCHWEITZ: Your Honor, you've addressed our
8 issues and the only thing that we would ask is to set another
9 day on the calendar if possible for another conference like
10 this given how helpful it's been.

11 THE COURT: I'm happy to do that. Let me just also
12 say we are working feverishly on the motions that are
13 outstanding here. Just in speaking to my colleagues and I'm
14 not quite sure, the filings, the civil filings on Long Island
15 are up significantly. There isn't a judge here in this
16 courthouse at the moment who I don't think feels overwhelmed
17 by the workload. Our case caseload hit the 600 active case
18 threshold within the past month. So just so that everyone
19 understands here we're as they say dancing as fast as we can
20 and I understand the concerns the plaintiffs have asserted
21 here with respect to the rights of their clients and I'm fully
22 cognizant of that. So you have my word that we will get these
23 things resolved as quicky as we possibly can.

24 MR. BUCHWEITZ: Thank you, Your Honor. We appreciate
25 that.

1 MR. SUGARMAN: Thank you, Your Honor.

2 MR. GUIDO: Your Honor, the only other issue the
3 defendants have for that latest case, not so much an issue but
4 an apology. I did misstate one fact in my letter to Your
5 Honor where I indicated that EEEA had not yet turned over any
6 documents to the defendants. That was my personal mistake.
7 Apparently in the prior litigation at least some documents,
8 quite a few documents had been turned over. The error was
9 brought to my attention by plaintiff's counsel and I am very
10 sorry for the misstatement.

11 THE COURT: All right. I understand that actually
12 because I had put a note to myself that I thought that was not
13 accurate based on information we had regarding the other case
14 before the Town was dismissed out of it. So I appreciate your
15 straightening out the record though.

16 How about in the East End Eruv v. The Village of
17 Westhampton Beach, et al., 11-213, anything there that anybody
18 needs to address?

19 MR. BUCHWEITZ: No, Your Honor. As far as the
20 plaintiffs are concerned everything is set and we'll get you
21 those documents for in camera review as soon as possible and
22 we'd ask the same thing to set another conference date.
23 Perhaps the second half of February makes sense.

24 THE COURT: Yes. All right. We'll that in just a
25 moment.

1 How about --

2 MR. DORFMAN: This is Leo Dorfman.

3 THE COURT: Yes.

4 MR. DORFMAN: This is Leo Dorfman, Your Honor. I
5 just wanted to say that we have nothing to add.

6 THE COURT: Okay. Anybody else?

7 MALE VOICE: Josh [inaudible] from [inaudible]. We
8 have nothing to add as well.

9 THE COURT: All right. Let's see. How about Verizon
10 v. The Village of Westhampton Beach, 11-252?

11 MS. WEISGERBER: No outstanding issues, Your Honor.
12 This is Verizon. We don't have any outstanding issues.

13 THE COURT: Okay.

14 MR. MURDOCH: None for us, Your Honor.

15 THE COURT: All right.

16 MALE VOICE: Nothing for Westhampton Beach as well.

17 THE COURT: All right. Very good.

18 MALE VOICE: [Inaudible]

19 THE COURT: Hold on just a second. Let's take a look
20 at the calendar for the latter part of February.

21 [Pause in proceedings.]

22 THE COURT: I am on trial those last two weeks in
23 February but I do have some time available on Friday, the 28th.
24 I'm just looking here. Yes, I'm sorry, go ahead.

25 MR. BUCHWEITZ: I was going to say that seems okay.

1 MR. GUIDO: That's fine with the defendant.

2 THE COURT: How is 10:30? Does anybody have a
3 problem with 10:30 that morning?

4 MR. BUCHWEITZ: Not the plaintiffs, Your Honor.

5 MR. GUIDO: Defendant is available, Your Honor.

6 MS. WEISGERBER: No issues for Verizon.

7 MR. MURDOCK: No for LIPA.

8 MALE VOICE: [Inaudible] is available, Your Honor.

9 THE COURT: Did we catch everybody? I didn't hear
10 anybody say that that's a problem so I'm going to put it on
11 for February 28th at 10:30 and we'll use the same call in
12 mechanism if that works for everyone.

13 Who set this up, by the way?

14 MALE VOICE: [Inaudible]

15 THE COURT: Would we be using the same call in
16 numbers again or would you need a new --

17 MR. BUCHWEITZ: Yes, that's fine. We can use the
18 same one.

19 THE COURT: Very good. We'll make a note of that as
20 well then.

21 We'll get an order put up in the next day or two
22 summarizing what we talked about today and you'll proceed
23 according to the guidelines that we discussed and the
24 directives that I've given you and then I'll speak to you on
25 the 28th of February. All right. Thank you all. Have a good

1 rest of the day.

2 MR. GUIDO: Thank you, Your Honor.

3 MR. BUCHWEITZ: Thank you, Your Honor.

4 (Proceedings concluded at 12:15 p.m.)

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1 I certify that the foregoing is a court transcript from
2 an electronic sound recording of the proceedings in the above-
3 entitled matter.

4
5 _____
6 Shari Riemer

7 Dated: February 17, 2014
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